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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

ORANGE COUNTY WATER DISTRICT,

Plaintiff,

vs.

NORTHROP CORPORATION; NORTHROP GRUMMAN CORPORATION; AMERICAN ELECTRONICS, INC.; MAG AEROSPACE INDUSTRIES, INC.; GULTON INDUSTRIES, INC.; MARK IV INDUSTRIES, INC.; EDO CORPORATION; AEROJET-GENERAL CORPORATION; MOORE BUSINESS FORMS, INC.; AC PRODUCTS INC.; FULLERTON MANUFACTURING COMPANY; FULLERTON BUSINESS PARK LLC; and DOES 1 through 400, inclusive,

Defendants.

AND RELATED CROSS ACTIONS.

CASE NO. 04CC00715

[ASSIGNED TO THE HONORABLE KIM DUNNING, DEPT. CX104]

COMPLAINT FILED: DECEMBER 17, 2004

THE ARNOLD ENGINEERING COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR COST OF PROOF SANCTIONS AGAINST ORANGE COUNTY WATER DISTRICT; SUPPLEMENTAL DECLARATION OF STEVEN J. ELIE

Date: January 20, 2015
Time: 9:00 a.m.
Dept.: CX104

DISCOVERY CUTOFF: JANUARY 26, 2012
MOTION CUTOFF: JANUARY 11, 2012
TRIAL DATE: FEBRUARY 10, 2012

I. INTRODUCTION AND SUMMARY OF SUPPLEMENTAL ARGUMENT

This supplemental brief and declaration address the Court's questions at the October 17, 2014, hearing on Arnold's motion for cost of proof sanctions, including whether Arnold "proved the truth" of the matters raised in its Requests For Admission ("RFAs"). This supplemental brief and declaration also provide the evidence requested by the Court regarding the fees and costs incurred in proving the truth of RFAs, and include the time limitations the Court suggested were proper during oral argument.[1] As the Court agreed with Arnold that the exceptions to an award of sanctions set forth in *California Code Civil Procedure* §2033.420(b) do not apply, that matter is not addressed in this supplemental brief but Arnold reserves the right to address any District arguments in its Reply.

The Court's findings, based on the evidence developed before trial and presented during trial, conclusively established that Arnold proved the facts which the District wrongfully denied. The District's denials of focused RFAs forced Arnold to expend enormous amounts of attorney fees and expert costs to prove it did not release the chemicals at issue to soil or groundwater and that it did not release those chemicals in the geographic "plume" areas at issue in this action. We also address the costs and fees that Arnold incurred to prove the truth of its RFAs. Based on all of these factors, Arnold's revised request for proof of cost sanctions has been reduced from $2,852,785.92 to $954,218.14.

II. THE COURT'S FINDINGS BASED ON THE EVIDENCE CONCLUSIVELY ESTABLISH THAT ARNOLD PROVED THE FACTS WHICH THE DISTRICT IMPROPERLY DENIED

Arnold proved the facts set forth in its RFAs to the District. The bases for Arnold's request for a fee recovery are the Court's findings in the Statement of Decision ("SOD") – parts of which are repeated below to show these facts were proven—and the evidence behind those findings.

On page 8, lines 18-26 of the SOD, the Court confirmed that the phase one trial covered,

[1] This is without waiver to Arnold, in another forum, seeking to reinstate the full costs and fees incurred to disprove causation as set forth in Arnold's motion.

inter alia, "[t]he causes of action in the Second Amended Cross-Complaint for declaratory relief and equitable indemnity by each Defendant against the District [seeking] a declaration that no Defendant had any liability to Plaintiff. . . ." After the phase one trial, the Court found in Arnold's favor on all counts, including Arnold's cross-claim for declaratory relief. Specifically, the Court found:

> "Each Trial Defendant is entitled to a judicial declaration that it has no liability to the District for damages, response costs, or other costs claimed by the District, or any future costs associated with the NBGPP."
>
> [SOD, 74:22-24].

The Court's granting of declaratory relief was supported by the Court's causation findings in favor of Arnold, including, but not limited to:

> "No conduct by any Trial Defendant was a 'but for' cause or 'substantial factor' in District's damages, for the reasons stated in this Statement of Decision."
>
> [SOD, 74:17-18].

Trial Defendants/Cross-Complainants bore the burden of proof (and prevailed) on their affirmative claim against the District for declaratory relief. *See,* Cal. Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"); *Mulligan v. Wilson* (1949) 94 Cal.App.2d 286, 292 ("The burden of proof is upon plaintiff to show that conditions exist which will justify the court in exercising its discretionary powers to grant declaratory relief pursuant to section 1060 of the Code of Civil Procedure."); *Roadside Rest, Inc. v. Lankershim Estate* (1946) 76 Cal.App.2d 525, 526 (in action for declaratory relief, burden of proof lies with party seeking declaratory relief).

As the Court stated in the SOD:

> "The weight of the evidence establishes that AGFI, Arnold, CBS and Crucible did not release Chemicals of Concern into the shallow aquifer (i.e. groundwater), nor do their past activities threaten future groundwater contamination." [SOD, 46:7-9].

The Court also found that:

"The weight of the credible trial evidence failed to establish a causal connection between any Trial Defendant's localized releases of hazardous substances into the soil and costs the District has already incurred and might incur in the future." [SOD, 43:11-13].

The Court found that the only reason Arnold was on the District's list of "major" contributors was due to detections of TCE at a monitoring well located at the neighboring Johnson Controls site, but:

"Arnold's **defense evidence established by a preponderance of the evidence** that it did not use TCE in its operations." [SOD, 38:4-6 (emphasis added)] .

The Court also found:

"10. The preponderance of the evidence is that VOC releases to the shallow aquifer in the NBGPP area were not caused by any Trial Defendant except Northrop.

11. The preponderance of the evidence is that no conduct by any Trial Defendant, including Northrop, threatens to contaminate the shallow aquifer in the NBGPP area.

12. The preponderance of the evidence is that no conduct by any Trial Defendant, including Northrop, threatens future contamination of the shallow aquifer in the NBGPP area."

[SOD, 44:24-45:5].

As stated in Arnold's moving papers, the Court also made several other factual findings affirmatively in Arnold's favor which showed Arnold proved the RFA facts, including:

- "[T]he preponderance of the evidence showed that Arnold did not use TCE." [SOD, p. 48:20-21].
- "Arnold is not responsible for any PCE groundwater contamination in the NBGPP area." [SOD, p. 49:27-50:1].
- "[T]here is insufficient evidence that Arnold caused a release of 1,1,1-TCA or 1,1-DCE into soil." [SOD, p. 50:7-8].

- "Dr. Waddell did not opine at trial that Arnold used 1,4-dioxane or contaminated soil or groundwater with 1,4-dioxane." [SOD, p. 50:20-21].
- "[T]here is no basis for Dr. Waddell's opinion that Arnold's operations contaminated groundwater or threaten to contaminate groundwater." [SOD, p. 50:18-19].

The SOD is not an exclusive list of the Court's findings of fact. To the contrary, the Court expressly rejected any such limitation by stating:

> "[A] statement of decision need not summarize all the trial evidence or recite all the evidentiary facts the court found to be true. Per the court's explicit request, Trial Defendants submitted a thorough and over-inclusive proposed statement of decision. This Statement of Decision is a somewhat streamlined version. It is not meant to be, nor should it be construed as, a rejection by the court of the many evidentiary facts defendants included." [SOD, 2:16-21].

Thus, Arnold clearly proved at trial that did not release TCE, PCE, 1,1,1-TCA, or 1,4-dioxane to soil or groundwater, and that it did not contribute to soil or groundwater contamination in any geographic area at issue in this action. These were the facts that were addressed in Arnold's RFAs, and which the District unreasonably denied.

III. THE DISTRICT'S DENIALS OF ARNOLD'S RFA'S FORCED ARNOLD TO PROVE THAT IT DID NOT RELEASE TCE, PCE, 1,1,1-TCA, OR 1,4-DIOXANE TO SOIL OR GROUNDWATER AND IN SPECIFIC GEOGRAPHIC AREAS

As a result of the District's denials of Arnold's RFAs, Arnold was forced to defend itself at trial and expend funds on its expert Jon Rohrer to provide expert testimony that Arnold did not release any COC into any groundwater plume at issue in this litigation. In response to Request Nos. 5 and 10, the District denied that Arnold did not contribute to soil or groundwater contamination in area "D" as identified on the plume map attached to Arnold's Requests. Area D is directly under and downgradient of the former Arnold site. Additionally, the District denied Request Nos. 12-17 and 22-23 (regarding soil or groundwater releases of PCE, TCE, 1,1,1-TCA, and 1,4 dioxane).

The fact that the District's causation expert Richard Waddell identified TCE as the reason Arnold was on the list of "major" contributors does not absolve the District for responsibility for

Arnold's costs associated with proving it did not release PCE, 1,1,1-TCA, or 1,4-dioxane. While sanctions cannot be awarded where a party stipulated at trial to facts previously denied in response to RFAs (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 867–868; *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6), the District did not stipulate that Arnold was not responsible for PCE, 1,1,1-TCA, or 1,4-dioxane contamination. To the contrary, the District spent an inordinate amount of time attempting to place blame on Arnold for these chemicals (both pretrial and at trial). The District's closing statement regarding Arnold was dedicated almost entirely to the notion that Arnold was responsible for PCE contamination. [09/11/2012 R.T. at pp. 7612-7626]. After arguing at length that Johnson Controls was not responsible for PCE contamination [*id.* at 7612:12-7615:9], and after arguing for several pages of the trial transcript that Arnold (and not other occupants of the site) is responsible for shallow soil contamination of PCE [*id.* at 7615:13-7620:16], the District's counsel concluded:

> "The circumstantial evidence indicates very high concentrations associated with functions that involve the use of a stripper [by Arnold], and then we find PCE and TCE at that very location." [*Id.* at 7620:17-20 (clarifying statement added)].

Moreover, the District cross-examined Arnold's expert Jon Rohrer at length in an attempt to establish Arnold's purported releases of PCE, 1,1,1-TCA and TCE. [08/21/2012 R.T. at pp. 7009-7029].

The District's insistence on blaming Arnold for groundwater cleanup costs associated with PCE was patently unreasonable, given that Dr. Waddell testified during deposition that Arnold was not responsible for PCE contamination in groundwater. Specifically, during deposition, Dr. Waddell testified as follows:

> "Question: And is it correct, then, that it's your opinion that the 1551 East Orangethorpe facility is not a contributor to PCE contamination to groundwater?
>
> Answer: The data that are available would indicate that it is not a source of PCE at this present time."

[04/17/2012 R.T. at p. 1081:7-14].

At trial, the District's counsel attempted to elicit Dr. Waddell's testimony that, contrary to his deposition testimony, Arnold was responsible for PCE releases to groundwater. [*Id.* at 1078:9-25]. The court sustained Arnold's *Kennemur* objection, and directed that Dr. Waddell's deposition testimony be adopted as his trial opinion. [*Id.* at 1085:2-6]. Thus, this is not a case where the District stipulated that Arnold was not responsible for PCE groundwater contamination. The Court had to force the District to comply with *Kennemur*.

Even after the Court's *Kennemur* ruling, Arnold was forced to refute the notion that it was responsible for PCE contamination, including preparing its expert witness for testimony regarding PCE. In fact, Mr. Axline proved Arnold's point by the testimony he cited during the October 17, 2014 oral argument on this motion. (see October 17, 2014 transcript at 20-21). Even as late as transcript page 7,014 (nearly 6,000 pages after the Court sustained the *Kennemur* objection), Mr. Axline persisted in cross-examining Arnold's expert about PCE releases allegedly made at the 1551 Orangethorpe site, long after the issue was supposedly settled by this Court's *Kennemur* ruling, thus causing Arnold to expend funds and attorney fees on PCE.

Moreover, Dr. Waddell testified that Arnold was responsible for 1,1,1-TCA/1,1-DCE groundwater contamination [04/17/2012 R.T. 1077:12-21], and that 1,4-dioxane is used as a stabilizer for 1,1,1-TCA. [04/09/2012 R.T. 624:5-6]. Thus, Arnold was forced to prove that it was not responsible for releases of PCE, TCE, 1,1,1-TCA, and 1,4-dioxane to groundwater and that it was not responsible for contamination in the several geographic areas at issue in this action. Arnold succeeded in proving the truth of all of the RFAs at issue, as reflected in the Court's Statement of Decision and discussed above.

IV. ARNOLD'S NARROWED REQUEST FOR SANCTIONS TARGETS THOSE EXPENDITURES INCURRED IN PROVING THE TRUTH OF ARNOLD'S RFAs

There is no doubt that Arnold should recover the costs incurred in proving the facts at issue. [CCP § 2033.420(b) (the Court "shall" award sanctions unless an enumerated exception applies)] As discussed on October 17, 2014, the cost of proving the disputed causation facts in this action involve much more than the time Arnold's expert and Plaintiff's expert were on the stand. Rather, it includes the discovery on those issues, depositions where counsel needed to be

present to address those issues, preparation work with experts, actual trial and motion work on those facts related to proving those facts. Importantly, part of proving Arnold was not responsible for groundwater contamination necessarily involved marshalling the evidence as to the upgradient sources that *were* responsible for the groundwater contamination passing under Arnold's former site. For example, Arnold incurred substantial costs (which also assisted the expert) in showing that: (1) Johnson Controls (not Arnold) was responsible for the contamination found at and under the Johnson Controls site; (2) Vista Paint was responsible for 1,4 dioxane and 1,1,1-TCA releases to groundwater upgradient of Arnold's former site; (3) AC Products was responsible for PCE and 1,4-dioxane groundwater contamination; and (4) PCA Metals was responsible for PCE and TCE groundwater contamination.

With this brief, Arnold submits reduced attorney invoices in support of its request for sanctions. As with its original request, Arnold does not seek any expense incurred before September 8, 2011 – the day the District served its original responses to Arnold's RFAs. At the Court's suggestion, Arnold no longer seeks recovery of expenses incurred after the close of evidence at trial (August 27, 2012). Additionally, Arnold has reduced the number of trial days for which Arnold seeks recovery. In fact, the accompanying attorney invoices omit most of the time entries that were presented with Arnold's original invoice exhibits, such that the number of pages of attorney invoices are reduced from 875 to 148. In particular, Arnold omitted time entries related to topics not specifically tied to the chemicals or areas (such as allocation of liability, reasonableness of the North Basin Project, the District's non-compliance with the National Contingency Plan, and mass calculation). All time entries relating to the Trial Defendants' joint expert Steven Larson and the District's modeling expert Graham Fogg were removed from the accompanying revised invoice exhibits as well. The revised attorney invoice exhibits reflect the dollar amounts actually billed to Arnold based on the actual rates of Arnold's attorneys, and identify the RFAs relevant to each time entry. In sum, Arnold's requested award for attorney's fees is reduced from $2,455,178.00 to $652,805.00 (a reduction of more than $1.8 million).

Arnold has also reduced the requested amount of sanctions pertaining to expert Rohrer's invoices. In particular, Arnold has omitted Mr. Rohrer's time entries associated with reviewing

and responding to the opinions of the District's modeling expert Graham Fogg, and in calculating contaminant mass in the North Basin and downgradient from the former Arnold site. The remainder of Mr. Rohrer's work was directed to the question of specific chemical causation and the geographic areas --- all at issue and the subject of Arnold's RFAs. Therefore, the time entries reflected in Mr. Rohrer's attached invoices pertain to the following RFAs that were denied by the District: 5 (no release of VOCs to groundwater around former Arnold site); 10 (no release of VOC's to soil around former Arnold site); 12 (no release of TCE); 13 (no release of TCE to groundwater); 14 (no release of 1,1,1-TCA); 15 (no release of 1,1,1-TCA to groundwater); 16 (no release of PCE); 17 (no release of PCE to groundwater); 22 (no release of 1,4-dioxane) 23 (no release of 1,4-dioxane to groundwater). As reflected in the attached invoices, Arnold seeks recovery for its expert expenses in the reduced amount of $301,413.14 (a reduction of $96,194.78 from Arnold's original request).

Combining the revised requests for attorney's fees and expert expenses, Arnold seeks a revised total amount of $954,218.14.

V. CONCLUSION

For the reasons stated in Arnold's moving papers and in this Supplemental Brief, Arnold requests the Court award proof of costs sanctions against the District in a total amount of $954,218.14.

DATED: November 21, 2014

MUSICK, PEELER & GARRETT LLP

By: _____

Steven J. Elie
Attorneys for THE ARNOLD ENGINEERING COMPANY

SUPPLEMENTAL DECLARATION OF STEVEN J. ELIE

I, Steven J. Elie, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Musick, Peeler & Garrett LLP, attorneys of record for THE ARNOLD ENGINEERING COMPANY ("Arnold"). I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify thereto.

2. This declaration supplements my original declaration submitted in support of Arnold's motion for proof of cost sanctions. The purpose of this declaration is to submit revised attorney and expert invoices in support of Arnold's substantially reduced request for proof of cost sanctions.

3. My original declaration submitted redacted copies of Musick Peeler's invoices pertaining to Arnold's representation in this matter. The original invoices reflected all the time worked by Musick Peeler attorneys and paralegals on this matter from the date the District's responses were served (September 8, 2011) through the June 20, 2014 Judgment in this matter. In the original invoices, my office redacted the actual amount Musick Peeler billed for its services because Arnold sought recovery based on the reasonable prevailing rates, not the actual amount billed by Musick Peeler.

4. Attached to this Declaration as **Exhibits A through L** are revised exhibits prepared by my office reflecting the Musick Peeler attorney fees claimed, but revised to include additional clarifying information described herein ("revised exhibits"). The revised exhibits differ from the original invoices in several important respects. First, the revised exhibits only reflect time worked from September 8, 2011 through the close of evidence at trial (August 27, 2012), rather than through the June 20, 2014 Judgment in this matter.

5. Second, the revised exhibits reflect the actual dollar amounts Musick Peeler billed for the work reflected in the invoices, based on the actual rates of each of the attorneys and paralegals.

6. Third, the revised exhibits include a new column, in response to the District's counsel's request, that identifies the RFAs relevant to each time entry.

7. Fourth, the revised exhibits omit most of the time entries reflected in the original invoices. In particular, Arnold omitted time entries related to topics related to causation but not specifically tied to the chemicals or areas (such as allocation of liability, reasonableness of the North Basin Project, the District's non-compliance with the National Contingency Plan, and mass calculation). All time entries relating to the Trial Defendants' joint expert Steven Larson and the District's modeling expert Graham Fogg were removed from the revised exhibits as well. The revised exhibits also omit Musick Peeler's attendance at most of the days of the phase one trial which were unrelated to the facts at issue in the RFAs. The only days of trial attendance for which Musick Peeler now seeks recovery are as follows:

TRIAL DAY	REASON DAY PERTAINS TO CAUSATION AS TO ARNOLD
04/17/2012	District's Direct Examination of Dr. Waddell re: Arnold
05/01/2012	Arnold's Cross-Examination of Dr. Waddell
05/04/2012	Percipient Witnesses Re: Arnold (R. Otero, D. Hopen)
05/08/2012	Arnold's Cross-Examination of Dave Mark (District's PMQ re: Arnold)
05/10/2012	Arnold's Cross-Examination of Dr. Waddell
05/18/2012	District's Re-Direct Examination of Dr. Waddell re: Arnold
05/22/2012	Arnold's Re-Cross-Examination of Dr. Waddell
06/21/2012	AQMD Custodian of Record re: Documents offered by District Against Arnold re PCE Documents
07/19/2012	Arnold Percipient Witness Don Farmer (via video deposition)
07/20/2012	Argument re: Exclusion of AQMD Documents offered by District Against Arnold; Video Deposition of PRP UOP (To Show Other Source of 1,4-Dioxane)
07/23/2012	District's Consultant Phillip Miller re: District's Failure To Investigate Other Occupants of Former Arnold Site
07/26/2012	AC Products Consultant Matthew McCollough (To Show Other Source of PCE and 1,4-Dioxane)
07/31/2012	District Chief Hydrologist Roy Herndon (To Show District's Failure to Investigate Other Occupants of Former Arnold Site)

08/14/2012	Johnson Control Witness Welch (To Show Other Source of Contamination at Johnson Control Site)
08/21/2012	Arnold's Expert Jon Rohrer

8. The omission of the aforementioned time entries, when combined with the omission of time entries post-dating the close of evidence at trial, result in the number of pages of attorney invoices being reduced from 875 to 148. Arnold's requested award for attorney's fees is reduced from $2,455,178.00 to $652.805.00 (a reduction of more than $1.8 million).

9. A true and correct redacted copy of Mr. Rohrer's invoices, reflecting Arnold's expert witness costs incurred after the District's September 8, 2011 service of its responses to Arnold's RFAs and all specifically relating to the causation issues necessarily tried in this case due to the District's failure to admit the RFAs, are attached hereto as **Exhibit M**. The first page of Exhibit M is a true and correct summary spreadsheet of Mr. Rohrer's invoices prepared by my office and which I reviewed for accuracy.

10. As reflected in the spreadsheet included in Exhibit M, Arnold deducted a substantial amount of Mr. Rohrer's time from its request for sanctions. In particular, Arnold has omitted costs associated with Mr. Rohrer's review and analysis of the opinions of the District's modeling expert Graham Fogg, and in calculating contaminant mass in the North Basin and downgradient from the former Arnold site.

11. The remainder of Mr. Rohrer's work was directed to the question of specific chemical causation and the geographic areas – all at issue in the RFAs, the subject of Arnold's RFAs at issue here. Therefore, the time entries reflected in Mr. Rohrer's attached invoices pertain to the following RFAs that were denied by the District: 5 (no release of VOCs to groundwater around former Arnold site); 10 (no release of VOC's to soil around former Arnold site); 12 (no release of TCE); 13 (no release of TCE to groundwater); 14 (no release of 1,1,1-TCA); 15 (no release of 1,1,1-TCA to groundwater); 16 (no release of PCE); 17 (no release of PCE to groundwater); 22 (no release of 1,4-dioxane) 23 (no release of 1,4-dioxane to groundwater).

12. As reflected in Exhibit M, Arnold seeks recovery for its expert expenses in the reduced amount of $301,413.14 (a reduction of $96,194.78 from Arnold's original request).

13. Combining the revised requests for attorney's fees and expert expenses, Arnold seeks a revised total amount of $954,218.14.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 21st day of November, 2014, at Los Angeles, California.

Steven J. Elie

PROOF OF SERVICE

Orange County Water District v. Northrop Corporation, et al.
Orange County Superior Court Case No. 04CC00715

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017-3383.

On November 21, 2014, I served the following document(s) described as **THE ARNOLD ENGINEERING COMPANY'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR COST OF PROOF SANCTIONS AGAINST ORANGE COUNTY WATER DISTRICT; SUPPLEMENTAL DECLARATION OF STEVEN J. ELIE** on the interested parties in this action.

☒ **BY FILE & SERVE XPRESS ELECTRONIC SERVICE (CRC 2.260(b)(c):** Based on a court order and agreement of the parties to accept service by e-mail or electronic transmission, I provided the documents listed above electronically to the File & ServeXpress website and thereon to those parties on the Service List maintained by the website by submitting and electronic version of the documents to File & ServeXpress. If the documents are provided to File & ServeXpress by 5:00 p.m., then the documents will be deemed served on the date that it was provided to File & ServeXpress.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 21, 2014, at Los Angeles, California.

Claire C. De Los Reyes